

Here, as in French, we will not entertain plaintiffs' argument that any alleged diet drug related heart problems were latent. See PTO No. 3281 at 12-13. We also reject the notion that plaintiffs could not reasonably have been aware of their stated injuries until their echocardiograms. As in French, we find that plaintiffs can reasonably be held to have knowledge of their injuries, the cause of their injuries and the conduct of their prescribing physicians as early as September, 1997 and at the latest by March, 2000. Thus, their actions accrued and the statute of limitations began to elapse at that time. See Fortenberry, 676 So.2d at 255.

V.

For the same reasons set forth in French, supra, Wyeth has met its heavy burden of showing that the in-state physician defendants are fraudulently joined. Accordingly, we will deny the motions of the plaintiffs to remand these actions to the several Mississippi state courts and will dismiss the complaints as to these physician defendants.

FEB-25-2004 17:55

US DISTRICT COURT EDPA

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (Phentermine/ Fenfluramine/Dexfenfluramine) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
-----	:	
JOYCE ANN ALLEN, et al.	:	
v.	:	CIVIL ACTION NO. 03-20310
WYETH, et al.	:	
	:	
BRENDA BARNETT, et al.	:	
v.	:	CIVIL ACTION NO. 03-20239
WYETH, et al.	:	
	:	
SARAH BROOKS, et al.	:	
v.	:	CIVIL ACTION NO. 03-20318
WYETH, et al.	:	
	:	
LORETTA GRANT, et al.	:	
v.	:	CIVIL ACTION NO. 03-20330
WYETH, et al.	:	
	:	
DAVID PICKERING, et al.	:	
v.	:	CIVIL ACTION NO. 03-20302
WYETH, et al.	:	
	:	
BETTY RAMSHUR, et al.	:	
v.	:	CIVIL ACTION NO. 03-20333
WYETH, et al.	:	
	:	
ROY SIMMONS, et al.	:	
v.	:	CIVIL ACTION NO. 03-20319
WYETH, et al.	:	
	:	
TRINA WATERS, et al.	:	
v.	:	CIVIL ACTION NO. 03-20323
WYETH, et al.	:	
	:	
ANTHONY WATSON, et al.	:	
v.	:	CIVIL ACTION NO. 03-20296
WYETH, et al.	:	
	:	
DOROTHY WINTERS, et al.	:	
v.	:	CIVIL ACTION NO. 03-20170
WYETH, et al.	:	
	:	
PAUL WOODCOCK, et al.	:	
v.	:	CIVIL ACTION NO. 03-20273
WYETH, et al.	:	

(5) the motion of plaintiffs in Sarah Brooks, et al. v. Wyeth, et al., CIV.A. No. 03-20318 (E.D. Pa.) to remand to the Circuit Court of Sharkey County, Mississippi is DENIED;

(6) all claims in Brooks against defendants Kurt Kooyer, M.D., Virginia Joyce Vittor, M.D., Calvin Hull, M.D., Jim Roberts, M.D., Dan W. Jackson, D.O., Glenn F. Morris, M.D., Randy Easterling, M.D., Douglas L. Conner, M.D., Andrea Phillips, M.D., S.A. Kumah, M.D., Andrew Murphy, M.D., Charles F. Brock, M.D., Eric D. Harding, M.D., S.J. Creekmore, M.D., F. Lee Neal, M.D., Marcus L. Hogan, M.D., Terry Jackson, M.D., and Patrick G. McLain, M.D. are DISMISSED;

(7) the motion of plaintiffs in Loretta Grant, et al. v. Wyeth, et al., CIV.A. No. 03-20330 (E.D. Pa.) to remand to the Circuit Court of Holmes County, Mississippi is DENIED;

(8) all claims in Grant against defendants John G. Downer, M.D., Michael Braden, M.D., Herbert Hicks, M.D., Stephen A. Tramill, D.O., Daniel Edney, M.D., H. Wade Westbrook, M.D., Hilton E. O'Neal, M.D., Edward O'Brien, M.D., James Riser, M.D., Keith Rushing, M.D., Mark B. Stanley, M.D., Edsel F. Stewart, M.D., Gerald A. Turner, M.D., Jasper D. McDuffie, M.D., Patrick G. McClain, M.D., William Munn, M.D., David Richardson, M.D., Howard Clark, M.D., Don Gibson, M.D., Harold J. Wheeler, M.D., Joseph Roberts, M.D., and James Leak, M.D. are DISMISSED;

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(9) the motion of plaintiffs in David Pickering, et al. v. Wyeth, et al., CIV.A. No. 03-20302 (E.D. Pa.) to remand to the Circuit Court of Jones County, Mississippi is DENIED;

(10) all claims in Pickering against defendant Terry Pitts, M.D. are DISMISSED;

(11) the motion of plaintiffs in Betty Ramshur, et al. v. Wyeth, et al., CIV.A. No. 03-20333 (E.D. Pa.) to remand to the Circuit Court of Jones County, Mississippi is DENIED;

(12) all claims in Ramshur against defendant Hugh Stancill, M.D. are DISMISSED;

(13) the motion of plaintiffs in Roy Simmons, et al. v. Wyeth, et al., CIV.A. No. 03-20319 (E.D. Pa.) to remand to the Circuit Court of Claiborne County, Mississippi is DENIED;

(14) all claims in Simmons against defendants Mark B. Stanley, M.D. and David M. Headley, M.D. are DISMISSED;

(15) the motion of plaintiffs in Trina Waters, et al. v. Wyeth, et al., CIV.A. No. 03-20323 (E.D. Pa.) to remand to the Circuit Court of Holmes County, Mississippi is DENIED;

(16) all claims in Waters against defendants John G. Downer, M.D., Anita Tribble, M.D., Jasper Moore, M.D., T.B. Parson, M.D., G.A. Carmichael, M.D., Calvin Hull, M.D., David L. Richardson, M.D., Edward Bryant, M.D., Dwilia South, M.D., Dorothy Gillespie, M.D., Edsel Stewart, M.D., Wayne Johnson, M.D., Patrick G. McLain, M.D., Howard Clark, M.D., Ronnye Purvis, M.D., Don Blackwood, M.D., and Charles Ozborn, M.D. are DISMISSED;

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(17) the motion of defendant Edward Bryant, M.D. in Waters (E.D. Pa.) to dismiss Trina Waters' claims (Doc. #11) is DENIED as moot;

(18) the motion of plaintiffs in Anthony Watson, et al. v. Wyeth, et al., CIV.A. No. 03-20296 (E.D. Pa.) to remand to the Circuit Court of Hinds County, Mississippi is DENIED;

(19) all claims in Watson against defendants Ron Lewis, M.D., Andrea Phillips, M.D., and Jasper D. Moore, M.D. are DISMISSED;

(20) the motion of plaintiffs in Dorothy Winters, et al. v. Wyeth, et al., CIV.A. No. 03-20170 (E.D. Pa.) to remand to the Circuit Court of Holmes County, Mississippi is DENIED;

(21) all claims in Winters against S. Rao Rayuda, M.D., Jasper Moore, M.D., John Downer, M.D., Michael O'Neal, M.D., Keith Stanford, M.D., and Elias Abboud, M.D. are DISMISSED;

(22) the motion of plaintiffs in Paul Woodcock, et al. v. Wyeth, et al., CIV.A. No. 03-20273 (E.D. Pa.) to remand to the Circuit Court of Humphreys County, Mississippi is DENIED;

(23) all claims in Woodcock against Karen Mullen, M.D., Richard Carter, M.D., Edward Holmes, M.D., Douglas Conner, M.D., David Richardson, M.D., Elmertha Burton, M.D., Jonn Mann, M.D., Maria Soriano, M.D., Kent Darsey, M.D., Patrick G. McLain, M.D., Mack Gorton, M.D., Robert Jordan, M.D., Dennis Simms, M.D., Edsel Stewart, M.D., Michael O'Neal, M.D., Keith Lay, M.D., David Webber, M.D., Don Gibson, M.D., Sam Fillingame, M.D., Howard Clark, M.D., David Richardson, M.D., Richard Warren, M.D., Robert

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US DISTRICT COURT EDPA

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Cooper, M.D., Stephen A. Tramill, D.O., David Clippinger, M.D., and Buford Lambert, M.D. are DISMISSED;

(24) the motion of plaintiffs in Jamie Woods, et al v. Wyeth, et al., CIV.A. No. 03-20272 (E.D. Pa.) to remand to the Circuit Court of Sunflower County, Mississippi is DENIED; and

(25) all claims in Woods against Howard Clark, M.D., Charles Borum, M.D., Patrick G. McLain, M.D., Bill Maddox, M.D., Obie McNair, M.D., Terry Lowe, M.D., Keith Stanford, M.D., Harold Wheeler, M.D., Edgar Donahoe, M.D., Rafe Armstrong, M.D., H. Todd Coulter, M.D., Keith R. Lay, M.D., Edmund Miller, M.D., Charles McClees, M.D., David Richardson, M.D., William Middleton, M.D., Gloria Butler, M.D., Frank Wade, M.D., Jasper Moore, M.D., W.L. Prichard, M.D., Virginia Vittor, M.D., F. Lee Neal, M.D., William B. Lucas, M.D., W. Paul Wilcox, M.D., Ben Sanford, M.D., and Margaret Powell, M.D. are DISMISSED.

BY THE COURT:

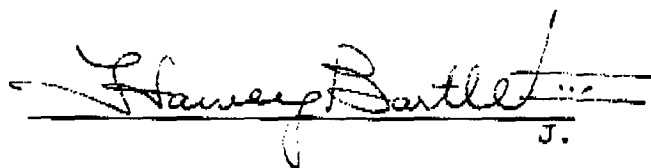

J.

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS
(PHENTERMINE, FENFLURAMINE,
DEXFENFLURAMINE) PRODUCTS
LIABILITY LITIGATION

: MDL DOCKET NO. 1203

THIS DOCUMENT RELATES TO:

SAUNDRA WILLIAMS, et al.

v.

WYETH, et al.

FILED FEB 24 2004

: CIVIL ACTION NO. 03-20244

JERRY STEVENS, et al.

v.

WYETH, et al.

: CIVIL ACTION NO. 03-20248

DOROTHY HOUSE, et al.

v.

WYETH, et al.

: CIVIL ACTION NO. 03-20247

PAULA FOWLER, et al.

v.

WYETH, et al.

: CIVIL ACTION NO. 03-20255

LOIS BRADY, et al.

v.

WYETH, et al.

: CIVIL ACTION NO. 03-20322

MEMORANDUM AND PRETRIAL ORDER NO. 3304

Bartle, J.

February 24, 2004

Before the court are the motions of class members in these five actions to remand to the appropriate Mississippi state courts their actions against defendants Wyeth,¹ the physicians who have prescribed Wyeth's diet drugs Pondimin and/or Redux for them, and John Does 1-50 -- anonymous detail persons and

ENTERED

1. Wyeth was previously known as American Home Products Corporation ("AHP").

CLERK OF COURT

marketing representatives of Wyeth. The state court actions were captioned: Saundra Williams, et al. v. Wyeth, et al., (Miss. Cir. Ct. Hinds County filed Dec. 30, 2002); Jerry Stevens, et al. v. Wyeth, et al., (Miss. Cir. Ct. Jasper County filed Dec. 30, 2002); Dorothy House, et al. v. Wyeth, et al., (Miss. Cir. Ct. Jasper County filed Dec. 30, 2002); Paula Fowler, et al. v. Wyeth, et al., (Miss. Cir. Ct. Hinds County filed Feb. 24, 2003); and Lois P. Brady, et al. v. Wyeth, et al., (Miss. Cir. Ct. Jones County filed Feb. 24, 2003). The five actions have 39 plaintiffs in total.

According to Wyeth, the plaintiffs, with the exception of Charlotte Baughman,² have exercised their right of back-end or intermediate opt-out under the nationwide class action Settlement Agreement ("Settlement Agreement") in Brown v. American Home Products Corporation, CIV. A. No. 99-20593 (E.D. Pa. Aug. 28, 2000) ("Pretrial Order ("PTO") No. 1415"), which encompassed persons who ingested Wyeth's diet drugs Pondimin and Redux. See e.g., Settlement Agreement at § IV(A), (B), and (D)(4). Under the Settlement Agreement, those who have exercised an intermediate or back-end opt-out may sue Wyeth for compensatory damages in the tort system rather than obtain benefits from the AHP Settlement Trust. Unlike initial opt-outs, these plaintiffs were class members at the time of the approval of the class

2. Wyeth has submitted the declaration of Scott Monroe, an attorney for the law firm of Brown Greer, PLC, that plaintiff Baughman failed to exercise her back-end or intermediate opt-out rights. We need not decide that issue here.

action settlement and continue to be so even though they now have separate lawsuits pending.

There are 39 plaintiffs in these five actions, and they are all represented by the same counsel. Their motions for remand are before the undersigned as the transferee judge in MDL 1203, the mass tort litigation involving Wyeth's diet drugs commonly known as fen-phen. No federal claim for relief is alleged. Because these motions present nearly identical legal and factual issues, we will address them together.

I.

In brief summary, plaintiffs, all citizens of the state of Mississippi, filed their lawsuits for injuries sustained as a result of their use of the diet drugs known as Pondimin and/or Redux. The defendant Wyeth, the manufacturer of Pondimin and Redux, is a party of diverse citizenship from the plaintiffs. The defendant physicians who prescribed Pondimin and/or Redux to plaintiffs are alleged to be citizens of Mississippi. Finally, plaintiffs aver that the John Does 1-50, fictitious detail persons and marketing representatives, are adult citizens of Mississippi.

Plaintiffs originally filed their complaints in Mississippi Circuit Courts between December, 2002 and February, 2003, more than five years after fen-phen was withdrawn from the market in September, 1997. Wyeth timely removed the actions to the United States District Court for the Southern District of Mississippi. The Mississippi federal court deferred ruling on

plaintiffs' remand motions, and the cases were then transferred to this court as part of MDL 1203.

The plaintiffs maintain that remand is appropriate because complete diversity does not exist as required under 28 U.S.C. § 1332(a). Wyeth counters that the non-diverse physicians were fraudulently joined because the applicable two-year statute of limitations bars plaintiffs' claims against these non-diverse defendants.³ See Miss. CODE ANN. § 15-1-36 (West 2003). Thus, Wyeth argues, plaintiffs' claims against these non-diverse defendants should be disregarded for purposes of determining diversity of citizenship of the parties. Plaintiffs respond that the statute of limitations has not expired because they discovered their injuries less than two years prior to filing their motions for judgment against the non-diverse defendants.

II.

This court addressed the identical issues presented by plaintiffs' remand motions in PTO No. 3281 in French, et al. v. Wyeth, et al., CIV. A. No. 03-20353 (E.D. Pa. Feb. 18, 2004), which is also part of the nationwide diet drug litigation. In French, we laid out in detail the standards for removal based on diversity jurisdiction and fraudulent joinder. See PTO No. 3281

3. The statute of limitations is not an issue in plaintiffs' claims against Wyeth, which has waived its right to assert any time bar in return for the plaintiffs giving up their right to sue Wyeth for "punitive, exemplary, or multiple damages." Settlement Agreement § IV.D.3.c; see PTO No. 2625 and PTO No. 2680.

at 2-4. Because we examined the same legal issues as they applied to nearly identical facts in French, we need not revisit them here.

III.

The key issue in these cases, as in French, is whether the prescribing physicians, all purportedly Mississippi citizens, were fraudulently joined as defendants for the purpose of destroying diversity of citizenship and preventing removal. Plaintiffs have brought claims for medical negligence against all of these non-diverse defendants.

Wyeth argues that plaintiffs' complaints do not state colorable claims against these defendants because plaintiffs' claims are barred by the Mississippi statute of limitations. The statute provides in relevant part:

For any claim accruing on or before June 30, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.

Miss. CODE ANN. § 15-1-36(1) (emphasis added). For any claim accruing on or after July 1, 1998, the statute of limitations is the same for all relevant purposes.⁴

4. The statute of limitations for claims accruing after July 1, 1998 adds tolling provisions for fraudulent concealment and
(continued...)

In French, we set forth the standard for when an action "accrues" under Mississippi law. See PTO No. 3281 at 6. In short, an action accrues when a patient can reasonably be held to have knowledge of the injury itself, cause of injury, and the conduct of the medical practitioner. Fortenberry v. Mem'l Hosp. At Gulfport, Inc., 676 So.2d 252, 255 (Miss. 1996); see also First Trust Nat'l Ass'n v. First Nat'l Bank of Commerce, 220 F.3d 331, 336-37 (5th Cir. 2000); In re Catfish Antitrust Litig., 826 F. Supp. 1019, 1031 (N.D. Miss. 1993).

Plaintiffs contend that they brought their actions within two years "from the date the alleged act ... with reasonable diligence might have been first known or discovered." Miss. CODE. ANN. § 15-1-36(1). According to plaintiffs, they could not have reasonably discovered their purported injuries until their alleged heart problems were diagnosed after reviewing their echocardiograms. Plaintiffs assert that their diagnoses occurred less than two years prior to filing their complaint. Wyeth counters that plaintiffs should have been on notice of their stated injuries as a result of the widespread publicity accompanying the withdrawal of the diet drugs from the market in September, 1997. Wyeth further contends that plaintiffs should

(...continued)

instances when a foreign object is left in a patient's body. See Miss. CODE. ANN. § 15-1-36(2)(a), (b). Both provisions require a plaintiff to bring an action within two years of the time when the alleged injury or fraud should have been discovered, and no later than seven years after the alleged act of neglect. See id.

have known about their alleged injuries at the very latest in March, 2000, after Wyeth's extensive publicity campaign.

This court also discussed in French the massive publicity in Mississippi and nationwide concerning the withdrawal of the diet drugs from the market and their possible connection to valvular heart disease. See PTO No. 3281 at 7-12. We find that here, as in French, plaintiffs have not established that they discovered their alleged injuries less than two years prior to bringing their lawsuits. In light of this publicity, plaintiffs, through the exercise of reasonable diligence, should have discovered their alleged injuries at the very latest by March, 2000. However, their complaints were not filed until between December, 2002 and February, 2003. Thus, plaintiffs' claims against the in-state physicians are clearly time barred, and Wyeth has established that these in-state physicians are fraudulently joined.

In support of their contention that their injuries occurred within two years of the filing of their complaints, plaintiffs provide the court with affidavits from Dr. Oury and Dr. Massing, board certified cardiologists both stating that they are of the opinion that diet drug induced valvular heart disease is a latent disease. They do not opine as to when the disease manifested itself in any of the plaintiffs. These are the exact same affidavits that the plaintiffs in French submitted. In French, we determined that class members are collaterally estopped from relitigating the issue of latency because Judge

Louis C. Bechtle, after a full hearing on the issue, concluded that any injury related to the ingestion of the diet drugs occurred at or near the time of last use. See e.g., PTO No. 1415 at 104-08. For the same reasons set forth in French, we find that plaintiffs here are estopped from asserting that their alleged diet drug related heart problems were latent. See PTO No. 3281 at 12-13.

V.

Plaintiffs also bring claims against John Does 1-50 -- anonymous detail persons and marketing representatives of Wyeth whom plaintiffs believe to be citizens of Mississippi. Plaintiffs appear to join John Does 1-50 in an effort to defeat diversity. However, the removal statute provides that "the citizenship of defendants sued under fictitious names shall be disregarded." 28 U.S.C. § 1441(a). Thus, for the purposes of determining whether complete diversity exists so that these actions may remain in federal court, the citizenship of John Does 1-50 is irrelevant.

VI.

For the same reasons set forth in French, Wyeth has met its heavy burden of showing that the in-state physician defendants are fraudulently joined. Accordingly, we will deny the motions of the plaintiffs to remand these actions to the several Mississippi state courts and will dismiss the complaints as to these physician defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS	:	MDL DOCKET NO. 1203
(PHENTERMINE, FENFLURAMINE,	:	
DEXFENFLURAMINE) PRODUCTS	:	
LIABILITY LITIGATION	:	
THIS DOCUMENT RELATES TO:	:	
<hr/>		
SAUNDRA WILLIAMS, et al.	:	
v.	:	
WYETH, et al.	:	CIVIL ACTION NO. 03-20244
JERRY STEVENS, et al.	:	
v.	:	
WYETH, et al.	:	CIVIL ACTION NO. 03-20248
DOROTHY HOUSE, et al.	:	
v.	:	
WYETH, et al.	:	CIVIL ACTION NO. 03-20247
PAULA FOWLER, et al.	:	
v.	:	
WYETH, et al.	:	CIVIL ACTION NO. 03-20255
LOIS BRADY, et al.	:	
v.	:	
WYETH, et al.	:	CIVIL ACTION NO. 03-20322

PRETRIAL ORDER NO. 3304

AND NOW, this 24~~th~~ day of February, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of plaintiffs in Saundra Williams, et al. v. Wyeth, et al., CIV.A. No. 03-20244 (E.D. Pa.) to remand to the Circuit Court of Hinds County, Mississippi is DENIED;

(2) the claims in Williams against defendants Michael Albert, M.D., Gary A. Nelson M.D., and David Robertson M.D. are DISMISSED;

(3) the motion of plaintiffs in Jerry Stevens, et al. v. Wyeth, et al., CIV.A. No. 03-20248 (E.D. Pa.) to remand to the Circuit Court of Jasper County, Mississippi is DENIED;

(4) the claims in Stevens against defendants Sawmanojkumar Singh, M.D., Arthur Wood, M.D., Steven Tramill, M.D., John Doe M.D., David Pate M.D., Calvin Ennis, M.D., Robert Cubberly, M.D., Prentice Walker, M.D., Charles D. Borum, M.D., John Doe, M.D., George Camatsos, M.D., Fitzhugh L. Neal, M.D., and Fred Duggan, M.D. are DISMISSED;

(5) the motion of plaintiffs in Dorothy House, et al. v. Wyeth, et al., CIV.A. No. 03-20247 (E.D. Pa.) to remand to the Circuit Court of Jasper County, Mississippi is DENIED;

(6) the claims in House against Maria Soriano, M.D., Arthur E. Wood III, M.D., James Riser, M.D., Louis Rubenstein, M.D., Ruben Morris, M.D., Patrick McClain, M.D., Reginald Stewart, M.D., Michael Richards, M.D., and Constance Goodyear, M.D. are DISMISSED;

(7) the motion of plaintiffs in Paula Fowler, et al. v. Wyeth, et al., CIV.A. No. 03-20255 (E.D. Pa.) to remand to the Circuit Court of Hinds County, Mississippi is DENIED;

(8) the claims in Fowler against G.B. Shaw, M.D. and David Richardson, M.D. are DISMISSED;

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REED SMITH

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(9) the motion of plaintiffs in Lois P. Brady, et al. v. Wyeth, et al., CIV.A. No. 03-20322 (E.D. Pa.) to remand to the Circuit Court of Jones County, Mississippi is DENIED; and

(10) the claims in Brady against Bruce Pruett, M.D., Arthur Wood, M.D., Mohammed Assaf, M.D., Terry Lowe, M.D., Earl Lee Stewart, M.D., David Richardson, M.D., and Robert Gilliland, M.D. are DISMISSED.

BY THE COURT:

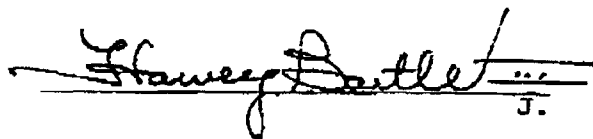

J.

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS	:	MDL DOCKET NO. 1203
(PHENTERMINE, FENFLURAMINE,	:	
DEXFENFLURAMINE) PRODUCTS	:	
LIABILITY LITIGATION	:	
THIS DOCUMENT RELATES TO:	:	
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AUDREY ALEXANDER v. WYETH, et al.	:	CIVIL ACTION NO. 03-20206
IDA HAYNES v. WYETH, et al.	:	CIVIL ACTION NO. 03-20143
RUTH HIGGINBOTTOM v. WYETH, et al.	:	CIVIL ACTION NO. 03-20142
THOMAS JARRELL v. WYETH, et al.	:	CIVIL ACTION NO. 03-20144
CYNTHIA KANODE v. WYETH, et al.	:	CIVIL ACTION NO. 03-20145
LINDA TRISVAN v. WYETH, et al.	:	CIVIL ACTION NO. 03-20141

MEMORANDUM AND PRETRIAL ORDER NO. 3230

Bartle, J.

January 29, 2004

Before the court are the motions of class members Audrey Alexander, Ida Haynes, Ruth Higginbottom, Thomas Jarrell, Cynthia Kanode, and Linda Trisvan to remand to the appropriate Virginia state courts their actions against defendants Wyeth,¹ the physicians who have prescribed Wyeth's diet drugs Pondimin and/or Redux for them, the physicians' respective practice groups, and John Does 1-3 -- anonymous detail persons and

1. Wyeth was previously known as American Home Products Corporation ("AHP").

marketing representatives of Wyeth.² The state court actions were captioned: Audrey Alexander v. Wyeth, et al., No. CL03-023905-00 (Va. Cir. Ct. Lynchburg filed Feb. 24, 2003); Ida Haynes v. Wyeth, et al., No. LP-2596-1 (Va. Cir. Ct. Richmond filed Oct. 30, 2002); Ruth Higginbottom v. Wyeth, et al., No. LP-2564-1 (Va. Cir. Ct. Richmond filed Oct. 25, 2002); Thomas Jarrell v. Wyeth, et al., No. LP-2664-4 (Va. Cir. Ct. Richmond filed Nov. 7, 2002); Cynthia Kanode v. Wyeth, et al., No. LP-2577-3 (Va. Cir. Ct. Richmond filed Oct. 25, 2002); Linda Trisvan v. Wyeth, et al., No. CL024996 (Va. Cir. Ct. Greenville filed Oct. 28, 2002).

The plaintiffs in these actions have exercised their right of back-end opt-out under the Nationwide Class Action Settlement Agreement ("Settlement Agreement") in Brown v. American Home Products Corporation, CIV.A. No. 99-20593 (E.D. Pa. Aug. 28, 2000) ("Pretrial Order ("PTO") No. 1415"), which encompassed persons who ingested Wyeth's diet drugs Pondimin and Redux. See e.g., Settlement Agreement at § IV(A), (B), and (D)(4). Under the Settlement Agreement, those who have exercised a back-end opt-out may sue Wyeth for compensatory damages in the tort system rather than obtain benefits from the AHP settlement trust. Unlike initial opt-outs, these plaintiffs were class

2. Plaintiffs Ruth Higginbottom, Cynthia Kanode, and Linda Trisvan have also brought claims against Interneuron Pharmaceuticals, Inc. ("Interneuron"), the Massachusetts-based pharmaceutical company that promoted Redux. Because plaintiffs do not assert the joinder of Interneuron as a ground for remand, we need not address plaintiffs' claims against Interneuron.

members at the time of the approval of the class action settlement and continue to be so even though they now have separate lawsuits pending.

These six plaintiffs are all represented by the same counsel. Their motions for remand are before the undersigned as the transferee judge in MDL 1203, the mass tort litigation involving Wyeth's diet drugs commonly known as fen-phen. No federal claim for relief is alleged. Because these motions present nearly identical legal and factual issues, we will address them together.

I.

In brief summary, plaintiffs, all residents of the Commonwealth of Virginia, filed suit for injuries sustained as a result of their use of the diet drugs known as Pondimin and/or Redux. The defendant Wyeth, the manufacturer of Pondimin and Redux, is a party of diverse citizenship from the plaintiffs.³ The defendant physicians⁴ who have prescribed Pondimin and/or

3. Plaintiffs in their original state court pleadings claim that Wyeth is also a non-diverse defendant. Wyeth responds, and we agree, that at all relevant times, Wyeth was and still is a citizen of Delaware, where it is incorporated, and of New Jersey, where its principal place of business is located. See Notice of Removal at ¶ 6 (citing affidavit of John Alivernini, Assistant Secretary of Wyeth-Ayerst Laboratories). Plaintiffs provide no evidence to the contrary.

4. Specifically, plaintiffs have brought claims against the following physicians and their practice groups: Audrey Alexander claims that Thomas W. Eppes, Jr., M.D. and Central Virginia Family Physicians, Inc. prescribed Pondimin for her; Ida Haynes claims that Vanessa O. Johnson, M.D. and U.S. Medical Weight Loss Centers prescribed Pondimin for her; Ruth Higginbottom claims that Eric Joel DeMaria, M.D. prescribed Pondimin for her; Thomas

(continued...)

Redux for plaintiffs are residents of Virginia while the defendant physicians' respective practice groups also have their principal places of practice there. Finally, plaintiffs aver that the John Does 1-3, fictitious detail persons and marketing representatives, are adult citizens of Virginia.

Plaintiffs originally filed their motions for judgment⁵ in the Virginia state courts between October 2002 and February 2003, more than five years after fen-phen was withdrawn from the market in September, 1997. Wyeth timely removed the actions to the several United States District Courts in Virginia.⁶ The Virginia federal courts deferred ruling on plaintiffs' remand

4. (...continued)

Jarrell claims that James C. Barr, M.D. and Virginia Physicians, Inc. prescribed Redux for him; Cynthia Kanode claims that John R. Partridge, M.D., Corinne N. Tuckey-Larus, M.D., and Virginia Physicians for Women, Ltd. prescribed Pondimin, Redux, and/or Phentermine for her; and Linda Trisvan claims that Thomas Walker, M.D. prescribed Redux for her.

5. An action at law before a Virginia Circuit Court is commenced by the filing of a "motion for judgment". See Va. Sup. Ct. R. 3:3 (2003).

6. The specific date and place of plaintiffs' filings of motions for judgment and Wyeth's removal are as follows: Audrey Alexander filed on February 24, 2003 in the Circuit Court for the City of Lynchburg, Virginia, and Wyeth removed this action to the United States District Court for the Western District of Virginia on March 19, 2003. Ida Haynes, Ruth Higginbottom, Thomas Jarrell, and Cynthia Kanode filed respectively on October 30, 2002, October 25, 2002, November 7, 2002, and October 25, 2002, all in the Circuit Court for the City of Richmond, Virginia, and Wyeth removed these actions to the United States District Court for the Eastern District of Virginia between November 12 and November 14, 2002. Linda Trisvan instituted suit on October 28, 2002 in the Circuit Court for the County of Greensville, Virginia, and Wyeth removed this action to the United States District Court for the Eastern District of Virginia on November 13, 2002.

motions, and the cases were then transferred to this court as part of MDL 1203.

The plaintiffs maintain that remand is appropriate because complete diversity does not exist as required under 28 U.S.C. § 1332(a). Wyeth counters that the non-diverse physicians and physicians' practice groups were fraudulently joined because the applicable two-year statute of limitations bars plaintiffs' claims against these non-diverse defendants.⁷ See VA. CODE ANN. § 8.01-243(A) (West 2003). Thus, Wyeth argues, plaintiffs' claims against the non-diverse defendants should be disregarded for purposes of determining diversity of citizenship of the parties. Plaintiffs respond that the statute of limitations has not expired because they discovered their injuries less than two years prior to filing their motions for judgment against the non-diverse defendants.

II.

Under the federal removal statute, " ... any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court " 28 U.S.C. § 1441(a). Federal district courts have original jurisdiction over all civil actions between citizens of different

7. The statute of limitations is not an issue in plaintiffs' claims against Wyeth, which has waived its right to assert the statute of limitations defense in return for the plaintiffs giving up their right to sue Wyeth for "punitive, exemplary, or multiple damages." Settlement Agreement § IV.D.3.c; see PTO No. 2625 and PTO No. 2680.

states if the amount in controversy exceeds \$75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a)(1). Complete diversity, of course, is required. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967). If an action originally instituted in a state court could have been brought in federal court pursuant to diversity jurisdiction, the defendants may remove it to federal court provided certain procedures are followed and certain conditions met. 28 U.S.C. §§ 1441 and 1446. Similarly, if the federal court subsequently determines that it does not have subject matter jurisdiction over a removed action, it must remand the action to the state court where it originated. 28 U.S.C. § 1447(c). A plaintiff or a defendant may seek to remand the case, or the court may do so on its own motion. Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 16-19 (1951); 16 Moore's Federal Practice, § 107.41[1][b][i] (Matthew Bender 3d ed.); see also Moses v. Ski Shawnee, Inc., 2000 WL 1053568, at *2 (E.D. Pa. July 31, 2000).

The presence of a party fraudulently joined cannot defeat removal. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921). Under our Court of Appeals' decision in Boyer v. Snap-on Tools Corporation, 913 F.2d 108, 111 (3d Cir. 1990), joinder is fraudulent "where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment."

As an MDL court sitting within the Third Circuit, we must apply our Court of Appeals' fraudulent joinder standard. See In re Korean Airlines Disaster, 829 F.2d 1171, 1174 (D.C. Cir. 1987); In re Ikon Office Solutions, Inc. Secs. Litig., 86 F. Supp. 2d 481, 485 (E.D. Pa. 2000). As discussed above, we must decide whether there is a "reasonable basis in fact or colorable ground supporting the claim against the joined defendant." Boyer, 935 F.2d at 111.

We recognize that the burden on Wyeth to establish fraudulent joinder is a heavy one. See Wilson, 257 U.S. at 111. While we "must resolve all contested issues of substantive fact in favor of plaintiff," we do not take this to mean we must blindly accept whatever the party seeking remand may say no matter how incredible or how contrary to the overwhelming weight of the evidence. Id. We are also cognizant that the removal statute must be construed narrowly, and "all doubts should be resolved in favor of remand." Steel Valley Auth. v. Union Switch and Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987). The Supreme Court made it clear in Wilson that if a plaintiff contests a defendant's assertion that joinder of another defendant was a sham to defeat removal, the District Court must determine the facts from the evidence. Wilson, 257 U.S. at 98. We are not to decide automatically in favor of remand simply because some facts may be said to be in dispute.

On matters of substantive law, "[i]f there is even a possibility that a state court would find that the complaint

states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court." Boyer, 913 F.2d at 111 (citation omitted). We are mindful that our inquiry into Wyeth's claim of fraudulent joinder is less searching than that permissible when a party seeks to dismiss a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Batoff v. State Farm Ins. Co., 977 F.2d 848, 852 (3d Cir. 1992); see also Gaul v. Neurocare Diagnostic, Inc., No. 02-CV-2135, 2003 WL 230800, at *2 (E.D. Pa. Jan. 1, 2003). In other words, simply because a claim against a party may ultimately be dismissed for failure to state a claim does not necessarily mean that the party was fraudulently joined. The test is whether this court thinks there is a "reasonable basis" for finding the claim to be colorable, that is, whether it is "wholly insubstantial and frivolous." Batoff, 977 F.2d at 852.

III.

The key issue for present purposes is whether the prescribing physicians and their respective practice groups, all purportedly Virginia citizens, were fraudulently joined as defendants for the purpose of destroying diversity of citizenship and preventing removal. Plaintiffs have brought claims for medical negligence against all of these non-diverse defendants.

Wyeth argues that plaintiffs' motions for judgment do not state colorable claims against these defendants because plaintiffs' claims are barred by the Virginia statute of

limitations. It reads in pertinent part that "every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues." VA. CODE ANN.

§ 8.01-243(A). The Virginia Code further provides that "[i]n every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person." VA. CODE ANN.

§ 8.01-230 (West 2003). Virginia courts have found that the injury is deemed to occur and the statute of limitations begins to run whenever any injury, however slight, is sustained. St. George v. Pariser, 484 S.E.2d 888, 889 (Va. 1997) (citation omitted). Moreover, even if a plaintiff suffers substantial effects from the injury only at a later date, the statute begins to run when the injury is first incurred. Lo v. Burke, 455 S.E.2d 9, 13 (Va. 1995).

Unlike some states that have adopted discovery rules, "Virginia law does not calculate statute of limitations in personal injury from the date of diagnosis." Wade v. Danek Medical Inc., 5 F. Supp. 2d 379, 382 (E.D. Va. 1998) (citations omitted). Instead, "a cause of action can accrue before a disease ... manifests itself by symptoms, since it is the onset of the disease itself that triggers the running of the limitation period." Hollingsworth v. Shenandoah Med. Imaging, Inc., 1996 WL 1065478, at *5 (Va. Cir. Ct. Jan. 18, 1996) (citation omitted).